

**United States Department of Labor
Employees' Compensation Appeals Board**

M.N., Appellant

and

**U.S. POSTAL SERVICE, LOS FELIZ STATION,
Los Angeles, CA, Employer**

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**Docket No. 15-0758
Issued: July 6, 2015**

Appearances:
Dianne Miles, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 18, 2015 appellant, through his representative, filed a timely appeal from an October 8, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated March 6, 2013 and the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of his claim.²

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as it was not timely filed and did not demonstrate clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant submitted new medical evidence with his appeal. The Board has no jurisdiction to review new evidence on appeal. *See* 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

On April 18, 2011 appellant, then a 58-year-old city carrier, filed an occupational disease claim alleging that he sustained bilateral osteoarthritis of the knees due to factors of his federal employment. He indicated that on November 9, 1998 he was hit on the right knee by a “full 775.” Appellant stopped work on March 1, 2011.

By decision dated July 5, 2011, OWCP denied appellant’s claim after finding that the medical evidence was insufficient to show that he sustained a diagnosed condition as a result of the accepted work factors.

On September 11, 2011 appellant requested reconsideration. In a decision dated March 6, 2013, OWCP denied modification of its July 5, 2011 decision.

On September 24, 2013 appellant filed a claim for compensation alleging that he experienced bilateral osteoarthritis of the knees due to work factors. He again noted that he was hit on the right knee by a full 775 and described his work duties. On December 18, 2013, in response to a telephone call, OWCP advised appellant that his occupational disease claim appeared to be the same as his prior claim and advised him to follow the appeal rights from the March 6, 2013 decision. It indicated that it would resend him a copy of its April 28, 2011 development letter.

In a progress report dated March 1, 2011, received by OWCP on September 30, 2013, Dr. Matthew Patrick Kelly, a Board-certified orthopedic surgeon, evaluated appellant for complaints of bilateral knee pain “aggravated by stairs and aggravated by work as [a] mail carrier.” He diagnosed knee arthritis and noted that x-rays revealed moderate-to-severe “tricompartamental osteoarthritis nearly bone on bone medially.”

By letter dated December 18, 2013, OWCP again informed appellant that he had filed a duplicate occupational disease claim and advised him to follow his appeal rights from the March 6, 2013 decision. It again sent a copy of its April 28, 2011 development letter.

In a report dated January 7, 2014, Dr. Julie Margaret Fuller, a Board-certified internist, diagnosed bilateral osteoarthritis of the knees. She noted that appellant worked 28 years for the employing establishment until his retirement in 2011. Dr. Fuller described his work duties and history of being struck on the right knee on November 9, 1998 at work. She reviewed the findings on magnetic resonance imaging (MRI) scan studies from 2005 and 2011. Dr. Fuller diagnosed bilateral osteoarthritis of the knees and degenerative medial meniscus tears bilaterally. She discussed appellant’s history of lifting, pushing, walking, and climbing stairs for 28 years at work and opined that it was “medically plausible that repetitive motion/cumulative trauma caused his bilateral OA [osteoarthritis] and degenerative meniscus tears.” In a progress report dated February 18, 2014, Dr. Fuller provided the same findings and noted that appellant had retired with “permanent restrictions for other claims.”

In a progress report dated April 2, 2014, Dr. Fuller diagnosed bilateral chondromalacia of the knees, bilateral derangement of the medial menisci, a degenerative left medial meniscus tear, and derangement of the left lateral meniscus. She noted that appellant attributed his condition to

repetitive motion at work, including walking on concrete, climbing stairs, lifting, pushing, and walking. Dr. Fuller found that he had permanent work restrictions and noted that he was “retired and has permanent restrictions for other claims.” She submitted a similar report on May 14, 2014.

On May 19, 2014 OWCP resent appellant a copy of the March 6, 2013 decision.

In a statement dated May 21, 2014, appellant described in detail his work as a letter carrier. He related that on November 9, 1998 a coworker accidentally hit him in the right knee. Appellant told his supervisor of the incident. The pain lessened, but he began favoring his right knee because of the pain. Appellant indicated that in 2000 x-rays of the knees did not show arthritis, but he later began to experience increasing pain and stiffness of his knees. He attributed his knee problems to his work as a letter carrier and related that retiring on disability did not improve his condition.

In a progress report dated June 25, 2014, Dr. Fuller indicated that an orthopedic consultant found that appellant was a “good candidate for [a] right or left total knee replacement or a bilateral procedure....” She noted that he attributed his condition to repetitive motion at work and was attempting to obtain coverage for his knee condition. Dr. Fuller again found that it was “medically plausible” that appellant’s osteoarthritis and degenerative meniscal tears were due to repetitive motion and trauma during the course of his employment.

In a statement dated January 7, 2014, received by OWCP on July 21, 2014, appellant attributed his knee condition to repetitive work duties and to being struck on the right knee on November 9, 1998.

On July 7, 2014 appellant requested reconsideration. He indicated that he had received a copy of the resent decision dated May 19, 2014. Appellant described Dr. Fuller’s findings in her January 7, 2014 report. He also resubmitted a November 9, 1998 statement in which he related that a coworker inadvertently struck him in the right knee on that date.

In form reports dated August 18 and September 22, 2014, Dr. Fuller diagnosed bilateral osteoarthritis of the knees and checked “yes” that the condition was due to the injury for which compensation was claimed.³ In accompanying progress reports, she provided findings on examination and discussed her treatment of appellant.

In a decision dated October 8, 2014, OWCP denied appellant’s July 7, 2014 request for reconsideration, finding that it was untimely and did not demonstrate clear evidence of error. It noted that there was no evidence that he did not receive a copy of the March 6, 2013 decision and indicated that resending a decision did not convey new appeal rights. OWCP determined that the medical evidence was insufficient to show error in its denial of appellant’s claim for a bilateral knee condition.

³ The form indicated that appellant was not claiming compensation for a particular period.

On appeal appellant contends that he submitted medical reports from Dr. Fuller dated August 11, September 22, and November 17, 2014 providing medical rationale supporting her finding that work duties caused his bilateral knee condition.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.⁴ As once such limitations, 20 C.F.R. § 10.607 provides that an application for reconsideration must be received within one year of the date of OWCP decision for which review is sought.⁵ OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁶

The term “clear evidence of error” is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director’s own motion.⁷ To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise, and explicit and must manifest on its face that it committed an error.⁸

ANALYSIS

OWCP correctly found that as appellant’s July 7, 2014 request for reconsideration was submitted more than one year after the last merit decision of record dated March 6, 2013, it was untimely. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision and also accompanies any subsequent merit decision on the issues.⁹ While OWCP sent appellant a second copy of the March 6, 2013 decision on May 19, 2014, it did not reissue the decision.

The record shows that OWCP mailed the March 6, 2013 decision to appellant’s address of record. There is no evidence that the decision was returned as undeliverable. Under the

⁴ 5 U.S.C. § 8101 *et seq.*

⁵ 20 C.F.R. § 10.607(a). The one-year period begins on the date of the original decision, and an application for reconsideration must be received by OWCP within one year of OWCP’s decision for which review is sought for merit decisions issued on or after August 29, 2011. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

⁶ 20 C.F.R. § 10.607(b).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011).

⁸ *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

⁹ 20 C.F.R. § 10.607(a); *Robert F. Stone, id.*

mailbox rule, it is presumed, absent evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.¹⁰ Because there is no evidence rebutting the presumption of receipt under the mailbox rule, the Board finds that appellant received the March 6, 2013 decision.¹¹ Consequently, appellant must demonstrate clear evidence of error by OWCP in denying his claim for compensation.¹²

The Board finds that appellant has not established clear evidence of error. Appellant submitted a March 1, 2011 progress report from Dr. Kelly, which discussed appellant's complaints of bilateral knee pain, aggravated by stairs and his work duties. Dr. Kelly diagnosed knee arthritis. He did not directly address the cause of the diagnosed condition and thus his report is insufficient to establish clear evidence of error.¹³

In a report dated January 7, 2014, Dr. Fuller described appellant's work duties and his history of being hit on the right knee at work on November 9, 1998. She diagnosed bilateral degenerative meniscal tears and bilateral knee osteoarthritis. Dr. Fuller opined that it was "medically plausible that repetitive motion/cumulative trauma" at work resulted in his knee condition. Her opinion on causal relationship, however, is speculative and does not manifest on its face that OWCP committed an error in denying appellant's claim.¹⁴ As discussed, clear evidence of error is intended to represent a difficult standard.¹⁵ The submission of a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁶

Appellant also submitted progress reports from Dr. Fuller dated February through September 2014 describing her treatment of appellant for bilateral chondromalacia, bilateral derangement of the medial menisci, derangement of the left lateral meniscus, and a degenerative left medial meniscus tear. Dr. Fuller did not attribute the diagnosed conditions to his work duties or otherwise address causation, and thus her progress reports do not establish clear evidence of error.¹⁷

On June 25, 2014 Dr. Fuller indicated that appellant was a good candidate for knee replacements. She again described his work duties and found that it was medically plausible that repetitive work caused his osteoarthritis and degenerative meniscal tears. However, in order to

¹⁰ *A.C. Clyburn*, 47 ECAB 153 (1995).

¹¹ *See G.S.*, Docket No. 12-1243 (issued November 26, 2012).

¹² *Supra* note 6; *see Debra McDavid*, 57 ECAB 149 (2005).

¹³ *See P.A.*, Docket No. 12-1813 (issued February 8, 2013).

¹⁴ *See T.W.*, Docket No. 13-594 (issued August 5, 2013).

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5 (October 2011); *see also Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁶ *A.S.*, Docket No. 15-17 (issued February 27, 2015); *D.G.*, 59 ECAB 455 (2008).

¹⁷ *See supra* note 13.

establish clear evidence of error it is not enough to show that evidence could be construed so as to produce a contrary conclusion. Instead, the evidence must shift the weight in appellant's favor.¹⁸ Dr. Fuller's report is insufficient to clearly show error by OWCP in its denial of appellant's claim.

In form reports dated August 18 and September 22, 2014, Dr. Fuller diagnosed bilateral knee osteoarthritis and checked "yes" that the condition was due to the injury for which compensation was claimed. Her form reports lack rationale and are insufficient to establish that OWCP erred in its denial of appellant's claim.

Appellant also resubmitted a November 9, 1998 statement in which he related that a coworker inadvertently struck him in the right knee on that date. This evidence, however, is not relevant to the question of whether he sustained his claimed occupational disease.¹⁹ Appellant also submitted statements describing his work duties. However, as OWCP accepted the occurrence of the claimed work factors, the pertinent issue in this case is medical in nature. In order to establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.²⁰

On appeal appellant contends that he submitted reports from Dr. Fuller dated August 11, September 22, and November 17, 2014 that contained rationale that his knee condition was work related. The record before OWCP's final decision contains reports from Dr. Fuller dated August 13 and September 22, 2014. As discussed, this evidence is insufficient to establish clear evidence of error as it does not manifest on its face that OWCP committed an error in denying appellant's claim. Dr. Fuller has not provided evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration, as it was not timely filed and did not demonstrate clear evidence of error.

¹⁸ See *J.F.*, Docket No. 10-2378 (issued August 16, 2011).

¹⁹ A traumatic injury is defined as a "condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift." 20 C.F.R. § 10.5(ee). An occupational disease is defined as a condition produced by the work environment over a period longer than a single workday or shift." 20 C.F.R. § 10.5(q).

²⁰ *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

ORDER

IT IS HEREBY ORDERED THAT the October 8, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 6, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board